EX PARTE OR LATE FILED

ORIGINAL

CAPITAL CITIES/ABC, INC. 21 Dupont Circle, N.W. Washington, D.C. 20036 (202) 887-7745

Government Affairs

Charlene Vanlier
Vice President and Washington Counse

DOCKET FILE COPY ORIGINAL

RECEIVED

MAY 12 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

May 12, 1994

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Dear Mr. Caton:

On behalf of Capital Cities/ABC, Inc., the enclosed information is transmitted for filing with the Commission on P.P. Docket No. 93-21. This information was discussed in a meeting on April 29, 1994, with Jonathan Levy of the Commission's Office of Plans and Policy, and Kathleen Franco from the Commission's Cable Services Bureau. Also in attendance were Ed Durso, the Executive Vice President and General Counsel of ESPN, Doug Melamed of Wilmer, Cutler & Pickering, and myself. The information contained in this letter is in response to requests for further clarification of points raised in the meeting and the comments filed by ABC Sports and ESPN.

1. To further clarify my letter of May 20, 1993, ABC's contract with the CFA permits non-ABC telecasts at any time in the home towns of the participating schools of all games that are not televised by ABC.

2. The Effect of Mandated Broadcast Coverage

INTV has argued that regulations requiring rights holders to sell television rights to local broadcasters, even though not necessary to ensure competition or efficiency in the marketplace, would further the interests of both local broadcasters and the communities they serve. In fact, however, such regulations would be unlikely to have those effects.

Consider, for example, a rule that would require, at least under some circumstances, Major League Baseball teams to sell the rights to televise a certain number of their games to local, over-the-air broadcast stations. Such a rule would create a "fire sale" -- especially in that large number of communities in which only one or two broadcast stations are interested in televising games (Typically, the stations that are interested in such telecasts are independent stations whose reach, absent cable distribution, is limited.). If these stations are aware that a portion of each team's games must be made available on local broadcast stations, they will simply wait out the team to get a below market price for this product. While the local stations would be assured of obtaining television rights, the prices would be artificially depressed, and the teams' revenues would be reduced.

No. of Copies rec'd 0 6
List ABCDE

Fax (202) 887-7854

The effect would be more than simply a windfall for the local telecasters. As we understand it, teams generally want both to provide for at least some broadcast coverage in order to generate and maintain visibility in the community and to obtain revenues from telecasters; and most teams are willing to sacrifice some television revenues in order to achieve the multiple objectives of broadcast coverage. If, however, teams had to sell broadcast rights at artificially depressed prices, they would be less willing (or able) to forego other revenue opportunities in order to further their marketing objectives. The teams would thus have an increased incentive to sell their remaining rights to the highest bidder. The result could be a reduction in the total number of games shown on over-the-air broadcast stations or an increase in the number of pay-per-view games or both. Teams might also seek other ways to make up the lost revenues, such as increasing ticket, parking and concession prices. Thus, regulations requiring distribution on broadcast stations would be likely to injure the teams, consumers and others throughout the community.

3. Attached is a copy of a memorandum that was filed in the Pappas v. Prime lawsuit, which has been discussed in various comments cited in this proceeding, and that contains information about college football telecasts and other relevant matters. Please note in particular pages 20-24 of the memorandum.

If there are any questions in connection with the foregoing, please contact me.

Sincerely,

Charlene Vanlier

cc: Jonathan Levy, Esq.
Kathleen Franco, Esq.

Enclosures

PP93-21

COPY

McCUTCHEN, DOYLE, BROWN & ENERSEN
JOHN N. HAUSER, State Bar No. 24010
DANIEL M. WALL, State Bar No. 102580
FRANK M. HINMAN, State Bar No. 157402
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

Attorneys for Defendant
The Pacific-10 Conference

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PAPPAS TELECASTING, INC. a California corporation, and as Public Trustee,

Plaintiff,

v.

PRIME TICKET NETWORK, a California Limited Partnership, CVN, INC., The PACIFIC-10 CONFERENCE, a California non-profit association, CAPITAL CITIES/ABC, INC., a New York corporation, and DOES 1 through 20, inclusive,

Defendants.

No. CV-F 92-5589-OWW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE PACIFIC-10 CONFERENCE'S SUMMARY JUDGMENT MOTION

Date: September 13, 1993
Time: 10:00 a.m.
Place: Room 5104
Honorable Oliver W. Wanger

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes

This case is about a miscommunication that allegedly deprived plaintiff of the ability to telecast one college football game live in the Fresno area on each of two Saturdays in 1991, when sixteen other games, 56 hours' worth, were shown live on those two days. No one involved here is responsible for that miscommunication, and were it not for that miscommunication there would be no case at all. Nonetheless, Pappas has dressed these facts up in ill-fitting tort and antitrust garb to try to make this case into something it's not. This simple miscommunication does not give rise to a tort claim, nor do the facts here allow resort to the antitrust laws in any event, because those laws protect competition, not competitors. Pappas cannot prove competitive injury, because competition for the sale of televised college football, in Fresno and elsewhere, is robust. Plaintiff's claims are factually and legally deficient, and should be dismissed.[1]

I. BACKGROUND

A. The Pacific-10 Conference

The Pac-10 is an unincorporated association of ten West Coast universities. Declaration of Thomas C. Hansen ("Hansen Decl.") ¶ 2. One of its primary goals is to balance the scholastic and athletic experiences of the student-athletes

/ / /

/ / /

---

[1] The Pac-10 understands that Pappas is in the process of amending its Complaint a second time in response to the Court's August 2 Order. This motion rests on different grounds from those before the Court on Prime Ticket's Motion to Dismiss, and the substantive deficiencies discussed below will not be cured by any jurisdictional amendments Pappas may make.

at its member institutions. Id. Members of the Pac-10 compete in a wide variety of intercollegiate athletics, including men's football. A football season consists of approximately 11 games, approximately seven of which are played against other Pac-10 members. At the end of each season, the Pac-10 member with the best intraconference record plays the winner of the Big Ten Conference in the Rose Bowl. Other Pac-10 teams are eligible to be chosen to compete in other post-season bowl games. Pac-10 teams compete vigorously for the chance to play in the Rose Bowl and other bowl games.

B. The Importance Of Television To Pac-10 Members

Having their teams' football games televised on a national or regional basis is important to the Pac-10's members for several reasons. First, it increases the exposure of both the team and the university, and helps the school recruit quality students, including student-athletes. Hansen Decl. ¶ 3. The universities also gain revenue from the sale of television rights, which allows them to finance further athletic and educational endeavors. Id. In addition, television exposure maintains alumni involvement, both financially and otherwise, with the universities, to the benefit of current students. Id.

To obtain these benefits, Pac-10 members must compete with universities across the country for national and regional television exposure. In particular, Pac-10 members compete with members of the College Football Association ("CFA"), which comprises 67 Division I-A colleges and universities with major football programs. The CFA currently has contracts with ABC

and ESPN for the broadcast of its members' football games. Hansen Decl. ¶ 5. Another powerful competitor in the television market is the University of Notre Dame, which has a strong nationwide following and enjoys great fan interest in its football games. Because of its unique popularity, Notre Dame currently has a contract with NBC for the broadcast of its football games. Id.

C. The Pac-10's Television Contracts

One way in which Pac-10 members compete for television exposure is by joining together as a conference to market the television rights to their home football games. Hansen Decl. ¶ 6. The Pac-10, along with the Big Ten Conference ("Big Ten"), currently has a contract with ABC for televising Pac-10 and Big Ten regular season home games. Hansen Decl. ¶ 3. The Pac-10 also has a contract with Prime Ticket Network, Inc. ("PTN"), covering football and some other Pac-10 home sporting events. Id.

Selling television rights as a conference allows the Pac-10 to take advantage of efficiencies that would not otherwise exist. Declaration of Janusz A. Ordover ("Ordover Decl.") ¶ 10. In essence, the Pac-10 creates a new product -- a whole season of football games, consisting of one or more games per week -- that it markets to each broadcaster. Hansen Decl. ¶ 6. This allows the broadcaster to: (1) wait until shortly before each week's games to decide which Pac-10 home game to televise; (2) promote more effectively its "series" of Pac-10 football, just as it promotes other series it broadcasts; and (3) save on transactions costs because it is

able to negotiate with the Pac-10 schools as a group, rather than individually. Ordover Decl. ¶ 10. Each of these factors makes the Pac-10's package of games more attractive to broadcasters, and allows the Pac-10 to compete more effectively against other sellers of college football. Id. ¶ 29.

The contracts with ABC and PTN contain certain provisions for time period exclusivity. See Ordover Decl. ¶¶ 16-20. When ABC televises a Pac-10 or Big Ten home game, no other telecast of a Pac-10 or Big Ten home game may be shown, except that a 45-minute overlap is allowed at both the beginning and end of the ABC game. Hansen Decl. ¶ 7. The Pac-10's agreement with PTN contains similar provisions for Pac-10 home games only. Id. ABC and other broadcasters of college football demand such exclusivity provisions to protect their investments, and the CFA and other sellers of college football provide them. Id. ¶ 8; Ordover Decl. ¶ 20. Thus, the Pac-10 has found it necessary to agree to such provisions to be competitive in the television market. Id.

Nonetheless, the Pac-10 insisted that the exclusivity provisions be sufficiently limited to allow for additional television or cable exposures of its members' football games. Ordover Decl. ¶¶ 21-22. Thus, in addition to the games televised by ABC and PTN, individual Pac-10 members can allow their home games to be shown live or delayed at times that do not conflict with the ABC or PTN telecasts. Id. ¶ 22; Hansen Decl. ¶ 8. Televising games on a delayed basis is especially common where there is a dedicated local audience for them. Declaration of James Livengood ("Livengood Decl.") ¶ 2;

Declaration of Dutch Baughman ("Baughman Decl.") ¶ 2. Also, the ABC and PTN contracts impose no restriction on the televising of its member institutions' away games. Hansen Decl. ¶ 7. Finally, while it often is beneficial to appear on national or regional telecasts, Pac-10 members sometimes feel that the inconvenience and expense of appearing on television is not worthwhile. Id. ¶ 8.

D. The Pac-10's Television Exposure

The Pac-10's goal in entering into the television contracts with ABC and PTN is to achieve broad national and regional coverage of the football games played by its member institutions, and it has succeeded. The Pac-10's contract with ABC that was in effect in 1991 requires the network to telecast at least 15 live "television exposures" (defined as either a Pac-10 or Big Ten home game telecast nationally or one or more such games telecast regionally to over 50% of the United States television households), consisting of at least 23 Pac-10 or Big Ten home games, per season. Hansen Decl. ¶ 4. The Pac-10's contract with PTN provides for the regional cablecast of an additional 12 Pac-10 home games per year. Id. During the 1991 football season, pursuant to its television agreements, 25 Pac-10 home games (plus 13 Big Ten home games) were televised live to a viewing audience of 40 million people. Id.

E. The FTC Investigation

In early 1990, the Federal Trade Commission began an investigation of the CFA, the Pac-10 and other conferences and entities. Hansen Decl. ¶ 9, Ex. A. In particular, the FTC was concerned with the effect on competition in what it called the

televised college football market of agreements between broadcasters and the CFA, as well as the Big Ten/Pac-10, for the acquisition of college football telecast rights. Id.; Ordover Decl. ¶ 8. At that time, the Pac-10 had television contracts with ABC and PTN which were substantively identical to those that existed during the 1991 season. Hansen Decl. ¶ 9. The FTC later dropped its investigation of the Pac-10/Big Ten, recognizing that the Pac-10 television agreements did not threaten injury to competition. Ordover Decl. ¶¶ 15 & 23. By contrast, the FTC filed a complaint against the CFA. Id.

F. The Present Dispute

The events underlying this case took place in 1991. That year, the Fresno State University ("FSU") football team was scheduled to play non-conference away games against two Pac-10 members, Washington State University ("WSU") and Oregon State University ("OSU") on September 14 and 21, respectively. FSU evidently had a contract with KMPH, a local Fresno television station, to telecast in the Fresno area a number of FSU football games during the 1991 season, including the OSU and WSU games. Complaint ¶¶ 32 & 33. KMPH had no contract, nor any communications, with either WSU or OSU. Declaration of Harold Gibson ("Gibson Decl.") ¶ 3; Declaration of Mike D. Corwin ("Corwin Decl.") ¶ 4.

In June 1991, Scott Johnson, the Assistant Athletic Director for Communications at FSU, telephoned Harold Gibson and Mike Corwin, Assistant Athletic Directors for WSU and OSU, respectively, to arrange a telecast of the football games. Johnson did not say in either conversation that he sought a

live telecast. All parties, except plaintiff, who wasn't there, agree about that.[2] Declaration of Scott Johnson ("Johnson Decl.") ¶ 2; Gibson Decl. ¶ 2; Corwin Decl. ¶ 2. In addition, both Gibson and Corwin have testified in their declarations, and Johnson does not dispute, that they had no reason to believe, and did not believe, that Johnson proposed a live telecast. Johnson Decl. ¶ 2; Gibson Decl. ¶ 3; Corwin Decl. ¶ 3. Because the majority of their schools' games for which they independently make televisions arrangements are shown on a delayed basis, both Corwin and Gibson had every reason to believe, and did believe, that Johnson proposed a delayed telecast. Gibson Decl. ¶ 2; Corwin Decl. ¶ 2.

On June 26, 1991 Johnson sent letters to both Corwin and Gibson to confirm their agreements. Neither letter mentioned a live telecast.[3] See Gibson Decl. Ex. A; Corwin Decl. Ex. A. In fact, no one at WSU or OSU had any idea that FSU envisioned a live telecast until mid-August, 1991 when Hal

---

[2] It is also interesting to note that not even Pappas' original Complaint alleged agreements for live telecasts. Compare Complaint ¶¶ 32 & 33 with Amended Complaint ¶¶ 50 & 51.

[3] While Johnson's letter was the only written communication between FSU and OSU concerning the proposed telecast, Fresno State also had signed a contract with WSU in January of 1988 concerning the September 14, 1991 football game. That contract, which FSU drafted, provided that Washington State would provide adequate facilities "to originate one (1) live radio broadcast and one (1) delayed telecast so as to enable [FSU] to fulfill its contractual obligations . . . ." Livengood Decl. ¶ 3, Ex. A (emphasis added). The contract further provided that a live telecast was conditioned on "the prior written consent" of the home team's athletic director. All parties agree that no such consent was either sought or given. Johnson Decl. ¶ 2; Livengood Decl. ¶ 3. This contract further supports the unanimous testimony of all parties involved that no live telecast was agreed upon, or even discussed.

Cowan, OSU's sports information director, received a "detail" of the proposed telecast from Howard Zuckerman, KMPH's producer, which indicated the telecast was to be live. Declaration of Hal E. Cowan ("Cowan Decl.") ¶ 2. Cowan alerted Corwin, who called the Pac-10, and was told that the game's 5:00 start time conflicted with the September 21 game selected by Prime Ticket, California at Arizona, which was to begin at 7:00. Corwin Decl. ¶ 3. Corwin reported this to Cowan, who then informed Johnson that no live telecast was possible at 5:00. Cowan Decl. ¶ 2. A few days before the game, Gary Cunningham, FSU's Athletic Director, called Dutch Baughman, OSU's Athletic Director, and requested a change in the start time, but Baughman told him it was too late to notify ticketholders of a change. Baughman Decl. ¶ 3.

Had Johnson notified OSU in June that FSU proposed a live telecast, it might have been possible to move the kickoff to accommodate it.[4] Baughman Decl. ¶ 3. In any event, the decision whether to do so would have been OSU's alone; the Pac-10 would not have been involved. Id.; Hansen Decl. ¶ 11.

Similar events occurred shortly before the FSU-WSU game, when the Pac-10 called Gibson to ask if WSU had agreed to a live telecast. Gibson said that he had not. Gibson Decl. ¶ 3. Jim Livengood, WSU's Athletic Director, then called Cunningham, an old friend, and said there must have been a

---

[4] The FSU-OSU game was originally scheduled to start at 5:00, and could have been shown live starting at any time between 3:15 and 4:15. Hansen Decl. ¶ 11. The FSU-WSU game, originally scheduled to start at 2:00, could have been telecast live starting at any time up to 12:45 or after 6:15. Id.

misunderstanding, and that no live telecast was possible at 2:00, when the game was scheduled, because of the 3:30 Stanford vs. Arizona game selected by Prime Ticket for telecast on the 14th. By that time, it was too late to move the kickoff, although the Pac-10's contracts would not have precluded doing so had WSU had adequate notice. Livengood Decl. ¶ 3. Again, that decision would have been WSU's alone. Hansen Decl. ¶ 11.

Because of the above miscommunication, which was not discovered until the last minute, and because Pappas chose not to do a delayed telecast, KMPH did not telecast either game. This lawsuit followed.

II. ARGUMENT

This case arose because, as a result of the above misunderstanding, which the Pac-10 had nothing to do with, plaintiff was unable to televise, live, two football games. Every business disappointment does not create a tort cause of action. Moreover, courts have criticized attempts to turn a simple commercial dispute into an antitrust case:

> Plainly, not all competitive conduct that injures another allows resort to laws regulating trade. Antitrust law is not intended to be as available as an over-the-counter cold remedy, because were its heavy power brought into play too readily it would not safeguard competition, but destroy it.

Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 1993 WL 196067, *1 (2d Cir. (N.Y.)); see also Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) ("antitrust laws are not balm for rivals' wounds"); Ass'n of Independent T.V. v. College Football Ass'n, 637 F. Supp. 1289, 1292 n.2 (W.D. Okla. 1986)

("Antitrust actions are often borne of commercial disappointment rather than a legal wrong."). Plaintiff cannot as a matter of law prove its state law tort claims, much less its antitrust claims.

A. The Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates the absence of any disputed issue of material fact, and the non-moving party fails to show that such a dispute exists. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts . . ., [it] must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citation omitted). As shown below, Pappas cannot raise a genuine issue of material fact with respect to any of its claims. Summary judgment is appropriate.

B. Pappas Cannot As A Matter Of Law Prove Its State Law Tort Claims

Plaintiff's state law claims are based on the allegation that the Pac-10 interfered with its ability to televise, live, the FSU-OSU and FSU-WSU football games. But Pappas never had that ability, because there never was an agreement to such a telecast. The Pac-10 cannot interfere with a right that never existed.

/ / /

/ / /

1. Plaintiff Cannot Prove That the Pac-10 Induced a Breach of Contract

To prove inducing breach of contract, Pappas must prove: "'(1) a valid and existing contract; (2) the defendant had knowledge of the contract and intended to induce its breach; (3) the contract was in fact breached by the other contracting party; (4) the breach was caused by defendant's wrongful and unjustified conduct; and (5) plaintiff suffered damages as a result of the breach.'" Rader Co. v. Stone, 178 Cal. App. 3d 10, 29-30 (1986) (citation omitted). Pappas cannot clear the first hurdle, because the contract it says the Pac-10 interfered with never existed. Every party involved with the negotiations between FSU and the two Pac-10 schools swears that no one ever mentioned a live telecast, much less agreed to one. Johnson Decl. ¶ 2; Gibson Decl. ¶ 2; Corwin Decl. ¶ 2. WSU and OSU never even considered agreeing to one. Gibson Decl. ¶ 2; Corwin Decl. ¶ 2. Absent a meeting of the minds on an essential term, no contract exists. Carlson, Collins, Gordon & Bold v. Banducci, 257 Cal. App. 2d 212, 222 (1967). This claim fails for that reason alone.[5]

2. Pappas Cannot Prove Interference with Prospective Economic Advantage

To prove intentional interference with prospective economic advantage, Pappas must prove: (1) an economic relationship containing the probability of future benefit;

---

[5] Pappas' failure to prove this element also disposes of each of the others, which revolve around the breach of a non-existent contract. Nor can Pappas prove the other elements independently.

(2) knowledge by the defendant of the relationship; (3) intentional acts by the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) proximately caused damages. Buckaloo v. Johnson, 14 Cal. 3d 815, 827 (1975). Pappas cannot prove that claim either, for the same reason discussed above. To make out its interference claim, plaintiff must prove as "a threshold requirement" that "it is reasonably probable that the lost economic advantage would have been realized but for the defendant's interference." Youst v. Longo, 43 Cal. 3d 64, 71 (1987) (emphasis in original). The profit Pappas claims is that resulting from a live telecast of the games at issue. However, no such profit was possible, much less probable, because neither OSU nor WSU agreed to a live telecast. The only profit Pappas had a possibility of realizing is that resulting from a delayed telecast, and Pappas does not allege, nor can it, that the Pac-10 interfered with that. See Complaint at ¶¶ 94-96. As with its contractual interference claim, Pappas seeks to recover a profit it had no chance of obtaining. It may not do so as a matter of law. Youst, 43 Cal. 3d at 74.

Pappas also lacks standing to bring an interference claim. The Ninth Circuit Court of Appeals reversed a judgment for plaintiff under closely analogous facts[6] in DeVoto v. Pacific Fid. Life Ins. Co., 618 F.2d 1340 (9th Cir.), cert.

---

[6] The facts are closely analogous assuming Pappas' allegations that there were contracts between FSU and the Pac-10 schools, which there weren't, and that the Pac-10 induced WSU and OSU to breach them, which it didn't. But even under these assumptions, Devoto compels dismissal.

denied, 449 U.S. 869 (1980). In Devoto, Bankers Mortgage Company had a contract with American Home Assurance Company whereby Bankers provided a service to American. In exchange for bringing the parties together, plaintiffs received a commission from American each time Bankers provided the service. Id. at 1343. Thus, like Pappas, plaintiffs had an economic interest in having the contract performed. Defendant Pacific induced Bankers to breach its agreement with American, depriving plaintiffs of their prospective economic gain. Despite the fact that Pacific "[was] aware of the brokers' business relation and knew its disruption was substantially certain to follow once the principal contract with American was disrupted," the Ninth Circuit found for defendant as a matter of law. Id. at 1347.

The Court held that plaintiffs were required to prove that Pacific had the specific intent to interfere with the arrangement between Bankers and plaintiffs. The claim failed because plaintiffs could not prove defendant's "purpose to injure [them]":

> The business relation between [plaintiffs] and American was of no concern to the defendants. Commissions anticipated by the broker did not, in any degree, motivate the defendants' interference with the contract between Bankers and American. The object of the interference was the principal contract, not the brokers' arrangement incidental to it.

Id. at 1349 (emphasis added). Similarly, Pappas alleges, at most, that the Pac-10 interfered with contracts (between FSU and the Pac-10 schools) to which KMPH's television agreement with FSU was "incidental." Even if that were true, it is legally insufficient to state a claim. The Pac-10's acts, if

any, "were not tortious as to the plaintiff[]" as a matter of law, and Pappas' claim fails for that reason as well. See id.

* * *

The above discussion demonstrates the illusory nature of plaintiff's tort claims against the Pac-10. We now turn to Pappas' attempt to turn non-existent tort claims into an antitrust case.[7]

C. Plaintiff Cannot Prove Any Of Its Antitrust Claims

1. This Is Not a Per Se Case

Plaintiff alleges that the Pac-10's television agreements with ABC and PTN are per se illegal. That is incorrect; only "naked restraints" on competition may be condemned per se. E.g., White Motor Co. v. United States, 372 U.S. 255, 263 (1963). Before so holding, a court must determine that the challenged practice "would always or almost

---

[7] Pappas may argue that summary judgment is inappropriate in an antitrust case. To the contrary, since Matsushita, the Ninth Circuit has repeatedly recognized that summary judgment is appropriate, even in Rule of Reason cases. See, e.g., Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1409 (9th Cir.) (summary judgment is especially useful to "save the parties and the courts from unnecessarily spending the extraordinary resources required for a full-blown antitrust trial."), cert. denied, 112 S. Ct. 617 (1991); Morgan Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1488-92 (9th Cir. 1991); R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.22d 139, 152-53 (9th Cir. 1989); (en banc); Eichman v. Fotomat Corp., 880 F.2d 149, 161-63 (9th Cir. 1989); Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1380 (9th Cir. 1989); Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168, 1175 (9th Cir. 1988); Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976, 984 (9th Cir. 1988). This is especially true where, as here, a plaintiff has "'placed all [its] eggs in the per se basket.'" Palmer v. Roosevelt Lake Log Owners Ass'n, 551 F. Supp. 486, 495 (E.D. Wash. 1982) (citations omitted). Pappas should not be allowed to put the Pac-10 to the enormous expense of defending an antitrust case it cannot begin to prove. Summary judgment should be granted as to these claims, too.

always tend to restrict competition and decrease output," rather than "'increase economic efficiency and render markets more, rather than less, competitive.'" Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., 441 U.S. 1, 19-20 (1979) ("BMI") (citations omitted). As BMI recognized, "[n]ot all arrangements among . . . competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints." Id.

The Pac-10 is engaged in a joint selling arrangement, not a group boycott.[8] It is settled that such arrangements often result in greater efficiency and increase overall competition, and any restraints they impose must be analyzed in light of their procompetitive justifications. National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103 (1984); BMI, 441 U.S. at 23-24; cf.

---

[8] Pappas' characterization of the Pac-10 television agreements as a group boycott is the sort of "formalistic line drawing" the Supreme Court has forbidden. See Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59 (1977). The group boycott classification "should not be expanded indiscriminately, especially where . . . the economic effects of the restraint are far from clear." Oksanen v. Page Memorial Hosp., 945 F.2d 696, 708 (4th Cir. 1991) (citing Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59 (1986)), cert. denied, 112 S. Ct. 973 (1992); see also Northwest Stationers, 472 U.S. at 298 ("mere allegation of a concerted refusal to deal does not suffice [for per se analysis] because not all concerted refusals to deal are predominantly anticompetitive"). Besides, this allegation makes no sense. Group boycotts are aimed at a competitor. U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993) ("Today that designation is principally reserved for cases in which competitors agree with each other not to deal with a supplier or distributor if it continues to serve a competitor whom they seek to injure."). To prove a group boycott, Pappas would have to be a competitor of the Pac-10 or its members. There is no such allegation here, nor could there be.

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 295-97 (1984) (joint purchasing arrangement analyzed under Rule of Reason); GTE Sylvania, 433 U.S. at 51 (intrabrand restraints often enhance interbrand competition); Ordover Decl. ¶¶ 9-10.

Analyzing nearly identical agreements between the CFA and the Big Eight conference on the one hand, and ABC, ESPN and Katz Communications on the other, Ass'n of Independent T.V. explained the rationale for Rule of Reason treatment:

> Joint ventures among competitors, including joint selling arrangements, may unleash positive economic forces and thus advance the ends of competition. Collaboration by competitors is not illegal when its purpose and principal effects are to increase production, streamline distribution, and otherwise spur competition.

637 F. Supp. at 1297 (emphasis added) (citing Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918)); see also U.S. Healthcare, 986 F.2d at 594 ("We doubt the modern Supreme Court would use the boycott label to describe, or the rubric to condemn, a joint venture among competitors in which participation is allowed to some but not all . . . ."). The FTC obviously agreed, because it did not even consider the possibility that the Pac-10/Big Ten contracts might be per se illegal. Ordover Decl. ¶ 13. The Pac-10's contracts must be

/ / /

/ / /

/ / /

/ / /

/ / /